of users as to be effectively available directly to the public, regardless of the facilities used."[62] An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[63]

The definitions of "telecommunications service" and "information service" can be traced back to the regulatory framework developed in the various "*Computer Inquiry*" decisions, wherein the Commission established a distinction between "basic services" and "enhanced services."[64] Under the *Computer Inquiry* regime, a "basic service" was defined as transmission capacity for the movement of information without change in form or content.[65] An "enhanced service," on the other hand, while containing a basic service component, also involves some degree of data processing that changes the form or content of the transmitted information.[66] Accordingly, applying the *Computer Inquiry* approach, the Commission generally categorized services that result in a protocol conversion as "enhanced services," whereas services that result in no net protocol conversion to the end user were deemed "basic services." To further amplify

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[62] 47 U.S.C. § 153(46).

[63] 47 U.S.C. § 153(20).

[64] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Notice of Inquiry, 7 FCC 2d 11 (1966) ("*Computer I NOI*"); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 FCC 2d 267 (1971) ("*Computer I Final Decision*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Second Computer Inquiry*"), Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) ("*Computer II Tentative Decision*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Second Computer Inquiry*"), Final Decision, 77 FCC 2d 384 (1980) ("*Computer II*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Third Computer Inquiry*"), Report and Order, 104 FCC 2d 958 (1986) ("*Computer III*") (subsequent cites omitted) (collectively, "*Computer Inquiry*").

[65] *Computer II* at ¶¶ 93-99.

[66] *Computer II* at ¶ 97.

this distinction, the Commission has observed that "[i]n enhanced services, communications and data processing technologies have become intertwined so thoroughly" that they are separate and distinct from basic services.[67]

In its 1996 *Non-Accounting Safeguards Order*, the Commission concluded that the terms "telecommunications service" and "information service" in the 1996 Act are analogous to the basic service/enhanced service dichotomy established under the *Computer Inquiry* decisions.[68] As was the case with basic services and enhanced services, the Commission has determined that telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services.[69] And just as under the *Computer Inquiry* approach, services that involve transmission of a user's information with no net protocol conversion have been categorized by the Commission as telecommunications services, rather than information services, pursuant to the definitions in the 1996 Act.[70]

The Commission had occasion to address the applicability of these statutory classifications to VoIP in its *Stevens Report*, wherein the FCC distinguished between "phone-to-phone" VoIP and "computer-to-computer" VoIP. The *Stevens Report* used the term "phone-to-phone" VoIP to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the use of customer premises equipment ("CPE") different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the PSTN; (3) it allows the

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[67] *Computer II* at ¶ 120.

[68] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 at ¶¶ 102-07 (1996) ("*Non-Accounting Safeguards Order*"); *Stevens Report* at ¶¶ 13, 33.

[69] *Stevens Report* at ¶ 13.

[70] *Non-Accounting Safeguards Order* at ¶ 106.

customer to call telephone numbers assigned in accordance with the NANP and associated international agreements; and (4) it transmits customer information without net change in form or content.[71]

In the case of "computer-to-computer" VoIP, the Commission found that callers use software and hardware at their premises to place calls using Internet access provided by an unregulated ISP that might not even be aware that a voice call is taking place.[72] In that scenario, the "VoIP provider" is simply providing software and hardware, not telecommunications or a telecommunications service. Similarly, the ISP "does not appear to be provid[ing] telecommunications to its subscribers," and indeed "may not even be aware that particular customers are using [VoIP] software, because IP packets carrying voice communications are indistinguishable from other types of packets."[73] Accordingly, the Commission concluded that computer-to-computer VoIP did not involve the provision of telecommunications service.[74] In the case of phone-to-phone VoIP, on the other hand, the Commission found that it lacks the characteristics of an information service and bears the characteristics of a telecommunications service.[75] However, the Commission declined to make a final judgment on the regulatory status of phone-to-phone VoIP without a more complete record focused on individual service offerings.[76]

The FCC has recently issued two decisions addressing the proper regulatory classification of specific services offered by pulver.com and AT&T, respectively, that employ IP-enabled

[71] *Stevens Report* at ¶ 88

[72] *Id.* at ¶ 87.

[73] *Id.*

[74] *Id.*

[75] *Id.* at ¶ 89.

[76] *Id.* at ¶ 90.

services in connection with the provision of voice communications.[77] In the *Pulver Declaratory Order*, the Commission found that users with an existing broadband Internet access connection could, after acquiring and appropriately configuring Session Initiation Protocol ("SIP") phones or downloading software that enables their personal computers to function as "soft phones," engage in free VoIP or other types of peer-to-peer communications with other Pulver users. The Commission concluded that, while Pulver users may "use" telecommunications in connection with the Pulver service, Pulver does not "provide" telecommunications because users must have their own broadband Internet connection. Rather, Pulver was found to be offering users "the capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information in a way contemplated by the Act to qualify as an information service."[78] In short, the Commission concluded that the Pulver service was simply an Internet application that facilitates peer-to-peer communication.

Pulver does not provide transmission capacity allowing its users to communicate with each other. Thus, just as e-mail and instant messaging have been found not to be telecommunications services, Pulver's peer-to-peer VoIP was found not to be a telecommunications service. In fact, the Pulver service might properly be viewed as nothing more than voice-enabled instant messaging. The *Pulver Declaratory Order* decision is entirely consistent with the Commission's analysis of computer-to-computer VoIP in the *Stevens Report*.

In the *AT&T VoIP Order*, AT&T sought a ruling that access charges do not apply to its specific service, whereby a portion of its interexchange voice traffic is routed over AT&T's Internet backbone. The Commission summarized this service as follows:

> Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's

[77] *Pulver Declaratory Order*; *AT&T VoIP Order*.

[78] *Pulver Declaratory Order* at ¶ 12.

> number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC. Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network. To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks. Therefore, AT&T does not pay terminating interstate access charges on these calls.[79]

The Commission concluded that AT&T's offering constitutes a "telecommunications service" because it offers "telecommunications for a fee directly to the public." As the FCC explained:

> [u]sers of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files. More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under Section 153(20) of the Act. End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T.[80]

The FCC took pains to emphasize that its *AT&T VoIP Order* was limited to services of the type described by AT&T, *i.e.*, an interexchange service that:

(1) uses ordinary CPE with no enhanced functionality;

(2) originates and terminates on the PSTN; and

(3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.[81]

Based on a review of the *Pulver Declaratory Order* and the *AT&T VoIP Order*, it is evident that the *Stevens Report* analysis continues to provide a useful framework for

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[79] *AT&T VoIP Order* at ¶ 11.

[80] *Id.* at ¶ 12.

[81] *Id.* at ¶ 1.

categorization of voice communications services. Cable Ops, however, suggest a slight refinement to the classifications used in the *Stevens Report* that might better account for intervening changes in technology, policy goals and legal developments. Thus, rather than focusing on the two classifications used in the *Stevens Report*: "phone-to-phone" and "computer-to-computer," it might be more useful to identify three general scenarios: "PSTN-to-PSTN," "IP-to-IP," and "IP-to-PSTN."

PSTN-to-PSTN would involve a call that leaves the calling party's premises in a standard circuit-switched protocol (such as SS7) and arrives at the called party's premises in the same form. Applying the analysis of the *AT&T VoIP Order*, it is clear that this scenario constitutes a telecommunications service even if the call is routed on an IP network at some point between the end users. The key point is that the communication begins and ends in a standard SS7 protocol; there is no *net* protocol conversion even if it is changed from SS7 to IP and back again to SS7.

In the case of an IP-to-IP call, because it is IP-enabled at the premises of both the calling party and called party, users will have the capability of "generating, acquiring, storing, transforming, retrieving, utilizing or making available information" in ways that are impossible with ordinary circuit-switched PSTN communications. Among the functionalities possible with IP Telephony when offered by a cable operator are the ability to display caller ID information on the TV screen, to access voice mails through the set-top box, to manage computer-based personal address books, to access call lists on a personal computer, and to remotely forward calls or stored voice mail messages to another number or location. Thus, as the Commission found in its *Pulver Declaratory Order*, such services are properly classified as information services.

The third classification proposed by Cable Ops involves a call that leaves the customer's premises as IP and terminates at the called party's premises as a traditional circuit-switched call.

Such a communication obviously involves a net protocol conversion, *e.g.*, from IP to SS7, and hence meets the information services definition.

Applying this framework to the IP Telephony services that Cable Ops contemplate offering over their broadband networks, it is clear that the only appropriate regulatory category is "information service." For the foreseeable future, the vast majority of the IP Telephony traffic generated by Cable Ops' customers will be routed through the PSTN for termination to parties that are customers of an incumbent LEC. Obviously, all such traffic will involve a "net change in protocol" (*e.g.*, IP to SS7), and hence must be categorized as an information service. Some amount of traffic will both originate and terminate on the managed broadband network constructed by the Cable Op, *e.g.,* where both the calling and called parties are customers of the Cable Op's IP Telephony service. As in the *Pulver Declaratory Order*, such traffic constitutes an information service due to the ability to offer enhanced functionalities, and it is not a telecommunications service because it must ride on the existing broadband connection serving the customers at both ends.

B. Specific Regulatory Requirements

The NPRM seeks comment on any specific regulatory requirements that should apply to particular categories of IP-enabled services, consistent with the Commission's policy of "fencing off IP platforms from economic regulation traditionally applied to legacy telecommunications services" and to apply targeted regulatory requirements "only where such requirements are necessary to fulfill important policy objectives."[82] Cable Ops agree that the classification of IP Telephony should carry with it the responsibility to advance certain overriding societal goals such as the ability to summon emergency responders (911), accessibility by the hearing impaired, protection of customer privacy and cooperation with law enforcement (CALEA).

While Cable Ops fully recognize the worthy objectives of the universal service program, pending completion of the Commission's ongoing efforts to reform that program, it may be premature to either require IP Telephony providers to directly fund universal service or apply for eligibility status. Similarly, given the well-recognized problems with the intercarrier compensation scheme, until a new regime is established, IP Telephony providers should be either exempt from intercarrier compensation requirements or, at least on an interim basis, allowed to exchange traffic with any telecommunications carrier on a mutual bill-and-keep basis. Moreover, there is no legal or policy basis to apply dialing parity/anti-slamming rules to IP Telephony providers that offer all-distance service at a flat rate. Finally, the categorization of IP Telephony as a Title I "information service" does not change to a Title II "cable service" merely due to delivery over the same facilities used to provide cable service. Each of these issues will be addressed in greater detail below.

[82] NPRM at ¶¶ 5, 45-70.

1. Intercarrier Compensation

Consistent with the position that IP Telephony is not a "telecommunications service" for the purpose of Title II regulation, Cable Ops believe that the Commission should not require IP Telephony providers to pay access charges applicable to interexchange services.[83] Instead, the Commission should address the issue of the applicability of access charges to IP Telephony services as part of its comprehensive reform of the intercarrier compensation scheme.[84] In the alternative and as an interim measure, the Commission should, at most, reach the functionally identical result by ruling that access charges for IP Telephony, when offered by a facilities-based providers, accrue on a "bill-and-keep" basis.[85] This approach is in keeping with the FCC's stated long-term objective for comprehensive access charge reform.[86] Indeed, at least one incumbent LEC is already offering network access services to VoIP providers in a manner that does not incur access charges.[87]

The current legacy access charge regime permits LECs to recover the cost of terminating traffic on their networks through monthly end-user common line charges, through per-minute access and reciprocal compensation charges, and in some part through reimbursements from the

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[83] The FCC recently ruled that access charges apply to VoIP services that: 1) use ordinary CPE with no enhanced functionality; 2) originate and terminate on the PSTN; and 3) undergo no net protocol conversion and provide no enhanced functionality to end users. *See AT&T VoIP Order.*

[84] *See Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶¶ 11-12 (2001) (*"Intercarrier Compensation NPRM"*); *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 ¶ 7 (2001) (*"CLEC Access Charge Reform Order"*); *AT&T VoIP Order.*

[85] Bill-and-keep may be particularly appropriate for IP Telephony in its nascent stage. The Commission tentatively concluded that bill-and-keep was a proper interim methodology for the termination of traffic from end offices to end users for LEC interconnection with the burgeoning CMRS industry, *see Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020 at ¶ 39 (1996), before deciding to apply Sections 251 and 252 of the Act to LEC-CMRS interconnection. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Memorandum Opinion and Order, 11 FCC Rcd 15499 at ¶ 1025 (1996).

[86] *Intercarrier Compensation NPRM* at ¶ 11-12.

[87] *See Qwest Announces New Policy Eliminating Access Charges on True VoIP Calls and Availability of New Local Services to VoIP Providers*, Press Release (April 26, 2004), available at: *http://www.qwest.com/about/media/pressroom/1,1720,1512_archive,00.html* (visited April 30, 2004).

Universal Service Fund ("USF").[88] This arcane system has long been recognized as problematic because it is laden with implicit subsidies and subject to widespread arbitrage abuse.[89] One fundamental problem with the current regime is that even though a significant portion of local switching costs do not vary with the amount of usage, LECs continue to recover these costs through traffic-sensitive charges.[90] This system is further complicated by the fact that under the current rules, network costs are broken down by interstate and intrastate components under the separations process.[91]

The FCC has a long-standing effort underway specifically designed to reform and rationalize the system for reimbursing LECs for access to their networks.[92] The FCC has recognized that one of the primary goals of this reform process is to bring the benefits of competition, including lower costs and technical innovation, to consumers.[93] To achieve these goals, the Commission has sought to create economically rational incentives to promote efficient market entry decisions.[94] To this end, the Commission is moving toward a system where access charges more properly reflect the manner in which switching and termination costs are incurred.[95]

The Commission has made significant strides in creating a more rational access charge rate structure. To date, the Commission has already removed many implicit subsidies and

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[88] *See, e.g., Low Volume Long-Distance Users*, Notice of Inquiry, 15 FCC Rcd 6298 at ¶¶ 1-3 (1999) ("*Low-Volume User NOI*"); *see also Intercarrier Compensation NPRM* at ¶¶ 5-7.

[89] *See, e.g., Low-Volume User NOI* at ¶ 5; *see also Intercarrier Compensation NPRM* at ¶¶ 11-12.

[90] *See Access Charge Reform*, Seventh Report and Order, 15 FCC Rcd. 12962 at ¶ 134 (2000) ("*CALLS Order*").

[91] *See, e.g.*, 47 C.F.R. § 69.301 *et seq.*

[92] *See CALLS Order* at ¶ 1; *see also Intercarrier Compensation NPRM* at ¶ 1.

[93] *See Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166*, Separate Statement of Chairman Michael K. Powell ("*Powell Access Charge Reform Statement*").

[94] *See Low-Volume User NOI*, Statement of Commissioner Michael K. Powell at I.

[95] *Id.*

permitted LECs to recover a greater proportion of the costs associated with terminating third party traffic through direct charges to their own end users while at the same time reducing the charges assessed to calling parties.[96] However, the current access charge regime was only intended to be an interim, transitional arrangement.[97] Indeed, comprehensive reform of the legacy system is still far from complete and numerous competing policy goals and technical challenges have yet to be resolved.

Properly addressing the significant issues raised by applying the current interim access charge system to IP Telephony providers, while also weaving these issues into a comprehensive access charge reform effort, will require that the Commission obtain answers to a range of questions beyond those raised in this proceeding. For example, it is not clear that it is even possible to design usage-based separations rules for IP-enabled networks. Further, designing IP Telephony networks that do provide the information necessary for the application of access charges would be difficult, if not impossible, for certain IP-based network architectures. At a minimum, providing such capabilities would be expensive. These costs, and any remaining implicit subsidies, could distort pricing incentives, stunt growth or stifle innovation just as IP Telephony is becoming a technically and economically viable service. The record necessary to properly address these issues already exists in large part in other proceedings currently before the FCC and it is unnecessary and potentially confusing for those involved in trying to craft a comprehensive reform for the FCC to attempt to re-create that record here.[98]

As a result, the FCC should address access charge issues relating to IP Telephony services in the intercarrier compensation proceedings that are already under way. It is entirely

[96] *See CALLS Order* at ¶ 31.

[97] *See, e.g., CLEC Access Charge Reform Order* at ¶ 7; *CALLS Order* at ¶ 29.

[98] *See AT&T VoIP Order* at ¶¶ 10, 18.

possible that the Commission will determine as a result of these proceedings that comprehensive access charge reform requires that IP Telephony providers pay access fees for certain types of traffic that is terminated on other providers' networks. To the extent this is the case, the Commission must permit facilities-based IP Telephony providers to receive payment for access to, or the transport and termination of traffic on, their networks as well. However, the FCC should not impose such requirements outside of a final comprehensive reform of the access charge system.

Cable Ops believe that a bill-and-keep method of intercarrier compensation is appropriate for facilities-based providers pending the completion of comprehensive access charge reform. However, promoting the Commission's goals of eliminating uneconomic arbitrage and encouraging facilities-based competition requires that that any bill-and-keep system the Commission ultimately adopts only apply to facilities-based providers – those that supply the physical connections to end users. Such an approach will ensure that the prices non-facilities-based providers charge reflect the cost of all of the facilities they use to provide their services. This will eliminate the possibility that regulatory factors will continue to lead to economically irrational behavior in the market for voice services.

The intercarrier compensation regime is designed to compensate for the use of the underlying physical facilities that enable an originating carrier to complete calls.[99] The equity of a bill-and-keep methodology assumes, among other things, that where traffic flows are balanced, the costs associated with terminating voice traffic is similar for both providers so that the cost of terminating calls by one provider is offset by the benefit it receives from originating calls to

[99] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Memorandum Opinion and Order, 11 FCC Rcd. 15499 at ¶ 1027 (1996).

customers delivered to the other provider's network.[100] Because the exchange is a financial wash, it makes economic sense to eliminate the administrative burdens associated with tracking traffic and engaging in billing and collection activities by migrating to a bill-and-keep approach.

However, the assumptions necessary for bill-and-keep to become an economically rational industry standard for intercarrier compensation are absent where non-facilities-based IP telephony traffic is involved. The costs associated with the construction, operation, and maintenance of wireline networks are significant. Non-facilities-based providers, by definition, do not construct wireline facilities and do not provide originating providers with access to such facilities. Their services instead ride the wireline facilities constructed by others.

Unencumbered with the cost of owning wireline facilities, non-facilities-based providers are able to underprice their facilities-based competitors while using the same facilities to deliver their services. This creates new opportunities for non-facilities-based providers to engage in arbitrage by permitting them to sell access to wireline networks at rates that do not reflect the true cost of constructing, operating, and maintaining those networks. This type of free riding will distort competitive markets and will have a chilling effect on the development of facilities-based competition by deterring entry and investment from new providers and by weakening existing facilities-based providers, who often have very narrow profit margins. Correspondingly, the artificially low price pressure created by non-facilities-based providers will make it difficult for facilities-based providers to secure the outside financing necessary to build and expand their wireline facilities.

Accordingly, to truly eliminate the opportunity for arbitrage and to promote facilities-based competition, the Commission should adopt an intercarrier compensation regime that permits facilities-based providers to exchange traffic on a bill-and-keep basis, while requiring

[100] *See id.* at ¶¶ 1111-18.

non-facilities-based providers to pay cost-based charges for access to, and the transport and termination of, traffic on LEC or broadband networks at rates and on terms deemed appropriate by the Commission. However, as discussed, until overall reform of the intercarrier compensation scheme is achieved, the best interim solution is to simply maintain the status quo and refrain from applying access charges to IP Telephony services. In the alternative and as an interim measure, at most the Commission should determine that access charges for IP Telephony offered by facilities-based providers accrue on a bill-and-keep basis in keeping with the FCC's current stated long-term objective for comprehensive access charge reform.[101]

2. Applicability of Universal Service Funding Requirements

In paragraph 64 of the NPRM, the Commission seeks comment on whether it possesses authority to require VoIP providers to contribute to universal service, and if so, how such contributions could be assessed in an equitable and nondiscriminatory fashion. The Commission itself has acknowledged that current universal service funding mechanisms are "interim" measures. Commissioner Martin has criticized the existing system, which is based on current telecommunications revenues, as unfair to carriers with decreasing revenues.[102] In contrast, the connections-based approach that the Commission sought comment on in 2002 has drawn fire from some consumer groups as unfair to low volume users, and that proposal remains pending.[103] Notably, the NPRM in this proceeding raises many of the same issues, demonstrating that the answers to these questions continue to be elusive.

To date, VoIP represents a small fraction of the total market for communications, and the category of IP Telephony proposed by Cable Ops herein represents an even smaller portion.

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[101] *Intercarrier Compensation NPRM* at ¶¶ 4, 11-12.

[102] *See Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, Statement of Commissioner Kevin J. Martin (2002).

[103] *See* NPRM at ¶ 63.

Because VoIP growth is in its infancy, the amount of forgone universal service contributions if VoIP providers are not required to contribute to universal service would be *de minimis*. Cable Ops submit that IP Telephony providers should not be compelled to contribute to the universal service system while the contribution methodology remains in flux. As with any new service, cable operators continue to face regulatory and technical issues when implementing IP Telephony. To require universal service contributions at this nascent stage in the development of IP Telephony would, without question, hinder its growth, as it would increase the costs faced by providers such as Cable Ops in deploying the service.

This issue further highlights the importance of the regulatory classification issue discussed above in Section III of these Comments. If IP Telephony providers are deemed to be "providers" of "telecommunications," they could be required to make universal service contributions. On the other hand, if found to be "users" of "telecommunications," IP Telephony providers would *not* be required to make universal service contributions. In making this determination, the Commission should not lose sight of the fact that *users* of telecommunications still contribute to universal service indirectly through the payments they make to the *providers* of any telecommunications service that they use. If the definitional issue is resolved against IP Telephony providers, *i.e.*, if they become classified as providers instead of users of telecommunications, they will be contributing twice to the fund – first, indirectly through their use of the services of others such as IXCs or CLECs, and second, directly through an assessment imposed by the FCC.

Although the universal service fees are perhaps intended by the Commission to be merely a "pass through" charge paid by the consumer and not the universal service contributor, consumers do not view the charges in this way. Rather, consumers views these charges as an additional tax or fee contained on their bill. The prospect that an IP Telephony provider may be

required, in effect, to make double contributions to the universal service fund will slow the growth of IP Telephony by hindering the ability of cable operators to make a business case for deploying such services.

In addition to making indirect contributions to universal service funding, IP Telephony providers also increase consumer welfare in other ways. For instance, once significant numbers of cable and other providers begin to deploy these offerings, IP Telephony will provide competitive pressure on traditional wireline telephony, and thereby promote efficiency and lower prices for consumers. However, requiring universal service contributions at this nascent stage in the development of IP Telephony will threaten the important role it could play in reducing costs for consumers.

Universal service contributions fund numerous initiatives at the behest of policymakers. The funds have been used to wire schools and libraries, to extend service in high cost and low density areas, or to subsidize service for low income consumers. At present, universal service contributions are not referred to as a universal service "tax." In reality, however, universal service contributions are exactly that, because there is little, if any, functional difference between a tax and the contributions. Requiring IP Telephony providers to contribute to universal service would represent a hidden tax on Internet use, and would conflict with other federal policies that may prohibit taxation of the Internet. For instance, both the House and Senate recently passed bills to extend a moratorium on imposing any new, special or discriminatory taxes on Internet access.[104] These policies justify exemption of IP Telephony from USF obligations at this time.

[104] *See, e.g.,* Internet Tax Nondiscrimination Act, S. 150, 108th Cong., 2d Sess. (2004). This bill, which passed in the Senate on April 29, 2004, seeks a four-year extension of the tax prohibitions of the Internet Tax Freedom Act, 47 U.S.C. §151. Originally enacted in 1998, the Internet Tax Freedom Act expired in November of 2003.

3. Emergency Calls

The NPRM generally seeks comment on the viability of 911 and E911 for VoIP services.[105] The NPRM distinguishes between 911 or "basic 911," which requires the delivery of "all 911 calls to the appropriate public safety answering point (PSAP) or designated statewide default answering point," and "enhanced 911," which requires certain carriers to be able to identify the caller's call-back number and location.[106]

Cable Ops support the goal of basic 911 for IP Telephony service. The first step towards this end requires IP Telephony providers to accomplish universal connectivity with PSAPs and other designated answering points. Such interconnection requires cooperation from the incumbent LEC.[107] Confronted with similar concerns, the FCC, pointing to Sections 251 and 252 of the Act and Section 51.307 of the Commission's rules,[108] assured wireless carriers of the right to interconnection.[109] However, to the extent IP Telephony providers are not considered telecommunications carriers, they may not statutorily qualify for such protections. The FCC must therefore extend the interconnection rights offered to telecommunications carriers to all IP Telephony providers to ensure that emergency calls can be routed to local PSAPs or other designated answering points.

As IP Telephony evolves, Cable Ops also support working towards providing more refined 911 capabilities, consistent with E911, such as call location identification and callback

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[105] *See* NPRM at ¶¶ 53-57.

[106] *See id.* at ¶ 52.

[107] *See In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, 14 FCC Rcd 20850 at ¶ 96 (1999) ("*E911 Second Order*").

[108] *See id.* at ¶¶ 100-01, n.148.

[109] *See id.* at ¶ 103 ("LECs have an obligation to provide CMRS carriers with nondiscriminatory access and interconnection to LEC networks for the provision of 911 and E911 services to wireless callers.").

number information. Indeed, IP Telephony 911 has the potential of offering even more sophisticated capabilities. As Chairman Powell recently noted,

> Internet-based services provide a tremendous opportunity for improving our E911 systems. The existing 911system is vital in our country, but limited functionally. In most systems, it primarily identifies the location from which the call was made. But an Internet voice system can do more. It can make it easier to pinpoint the exact location of the caller in a large building. It might also hail a doctor, and send a text or Instant Message alert to your spouse. Our 911 potential is limited only by the infrastructure available and the creativity we employ in developing 911 applications.[110]

Given the myriad means by which to offer IP Telephony services and the fact that this is a nascent technology, coupled with the highly competitive environment facing IP Telephony providers, enhanced 911 features should be allowed to evolve through marketplace forces. Rather than impose inflexible regulations, the Commission should work with relevant industry groups to design enhanced 911 features and technologies that are specifically tailored to IP Telephony providers.

4. Disability Access

The Commission should require IP Telephony providers to offer the equivalent of Telecommunications Device for the Deaf ("TDD") phones, to the extent feasible given the state of technology, and contribute proportionately to the Telephone Relay Service ("TRS") fund. Concomitantly, IP Telephony providers should be allowed to collect funding for TRS systems.

The Act defines TRS as

> telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.[111]

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[110] *See Voice Over Internet Protocol (VOIP) Hearing,* Senate Committee on Commerce, Science and Transportation, Feb. 24, 2004 (written statement of Michael K. Powell, Chairman, Federal Communications Commission).

[111] 47 U.S.C. § 225(a)(3).

Section 225(c) of the Act and Section 64.603 of the Commission's rules require common carriers "providing telephone voice transmission services" to provide TRS in their respective service areas.[112] Although, as explained in Section IV.A., IP Telephony is not a telecommunications service subject to the common carrier requirements of Title II of the Act, it does provide voice communications services. Requiring IP Telephony providers to offer TRS (once such TDD-like devices are available) also furthers the intent of Title IV of the Americans with Disabilities Act ("ADA"), *i.e.*, "to further the Communications Act's goal of universal service by providing to individuals with hearing or speech disabilities telephone services that are functionally equivalent to those available to individuals without such disabilities."[113]

The Commission in turn "has undertaken a number of initiatives to enable persons with disabilities to better access the broad range of telecommunications and information services available today."[114] In doing so, "the Commission has broadly defined TRS to include any service that enables persons with hearing or speech disabilities to use the telecommunications network to communicate by wire or radio, and not be limited to either telecommunications services or services that require a TTY."[115] Once TDD-like devices are available for IP Telephony applications, requiring IP Telephony providers to offer TRS would "enable persons with disabilities to better access the broad range of . . . information services available today," and not limit TRS "to either telecommunications services or services that require a TTY," in accordance with the above-stated policies.

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[112] *See* 47 U.S.C. § 225(c); 47 C.F.R. § 64.603.

[113] *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, 18 FCC Rcd 12379 at ¶ 2 (2003) ("*Second Report and Order*") (citing H.R. Rep. No. 101-485, Pt. 2, 129 (1990)).

[114] *Id.* at ¶ 3 (citing *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140 (2000) ("*Improved TRS Order*")).

[115] *Id.* at ¶ 6 (citing *Improved TRS Order* at ¶¶ 13, 88).

The Commission should recognize the importance of developing disability access to rules for IP Telephony at the industry's nascent stage. As Chairman Powell stated at the Commission's Solutions Summit, policy approaches to disability access have "always been retrofitted. It's always been bolted on at the end. And it's always twice as difficult, because it's been thought of at the end, after investments have been made, choices have been made, policies have been developed."[116] Now is the time for the Commission to set the course for disability access to IP Telephony.

The Commission should afford IP Telephony providers time to implement TRS to allow for the development of TDD-like technology suitable for IP Telephony. For example, the Commission previously has "temporarily or permanently waived the applicability of certain mandatory minimum standards because they either do not apply to IP Relay or IP Relay's technology required further development to meet the standards."[117] The Commission extended or granted waivers of mandatory minimum standards over IP Relay until January 1, 2008.[118] A similar approach should apply to IP Telephony.

Providing TRS means that IP Telephony providers should be eligible for reimbursement from the Interstate TRS Fund under the Commission's TRS rules. Including IP Telephony as a TRS service for which providers are reimbursed is a logical progression for the Commission, given the overall purpose of Section 225 of the Act, "which is to 'ensure that interstate and intrastate [TRS] are available, to the extent possible and in the most efficient manner, to hearing-

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[116] *Powell Urges Timely Solutions to VoIP Disability Access Issues*, COMMUNICATIONS DAILY, p. 1 (May 10, 2004).

[117] *Second Report and Order* at ¶ 9 (citing *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779 (2002) (*"IP Relay Declaratory Ruling & FNPRM"*).

[118] *Id.* (citing *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, 18 FCC Rcd 4761 (2003)).

impaired and speech-impaired individuals in the United States.'"[119] Congress provided for the compensation of TRS providers for their costs of providing TRS;[120] thus IP Telephony providers must be compensated to the extent that they are offering TRS.

5. Customer Privacy Issues

The NPRM inquires whether customer proprietary network information ("CPNI") rules should apply to VoIP subscribers.[121] Subject to limited exceptions, Section 222 of the Act and Sections 64.2001 *et seq.* of the Commission's rules impose upon telecommunications carriers the general duty to protect CPNI relating to their customers absent prior consent. CPNI includes:

> (A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.[122]

Given the consumer benefits of the CPNI rules, IP Telephony providers should generally be subject to CPNI rules even though IP Telephony is not properly classified as a telecommunications service.

To the extent that an IP Telephony provider is also a cable operator, it becomes necessary to reconcile any potential conflicts between the CPNI rules and cable operators' obligations under Section 631 of the Act to protect personally identifiable information ("PII") relating to their customers. Section 631 applies to cable service and "other services," defined to include

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[119] *Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, 18 FCC Rcd 16121 at ¶ 9 (2003) (citing 47 U.S.C. § 225(b)(1)).

[120] *See* 47 U.S.C. § 225.

[121] *See* NPRM at ¶ 71.

[122] 47 U.S.C. § 222(h)(1). "Subscriber list information" is "any information – (A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format." 47 U.S.C. § 222(h)(3).

"any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service."[123] Therefore, Section 631 would appear to apply to IP Telephony offered over a cable system by a cable operator. Subject to limited exceptions, cable operators cannot use their cable systems to collect or disclose customers' PII without their prior consent.

A potential conflict arises with respect to disclosure of customer PII for emergency services. Telecommunications carriers that provide telephone exchange service must provide subscriber list information, including that relating to customers with unlisted or unpublished numbers, to providers of emergency and emergency support services for purposes of delivering those services.[124] Under Section 631(c)(2)(C) of the Act, subscriber names and addresses can be disclosed to third parties only if the cable operator has provided customers with an opportunity to opt-out or limit such disclosures.[125] The mere fact that a customer has an unlisted or unpublished telephone number can arguably be deemed a determination to opt-out of such disclosures. While it seems evident that a cable IP Telephony provider's disclosure of its IP Telephony customers' names and addresses, as required by Section 222(g), would fall under Section 631(c)(2)(A)'s exception for disclosures that are "necessary to render, or conduct a legitimate business activity related to, a cable service *or other service* provided by the cable operator to the subscriber,"[126] Commission clarification on this point is essential, especially considering the penalty cable operators might face if incorrect.[127]

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[123] *See* 47 U.S.C. § 551(a)(2)(B).

[124] *See* 47 U.S.C. § 222(g).

[125] *See* 47 U.S.C. § 551(c)(2)(C).

[126] 47 U.S.C. § 551(c)(2)(A) (emphasis added).

[127] Section 631(f) of the Act allows customers to bring damages actions for violations of cable operators' obligations under Section 631. *See* 47 U.S.C. § 551(f)(1), (2).

6. CALEA

The Commission is conducting a separate rulemaking to address the Communications Assistance for Law Enforcement Act ("CALEA") relative to VoIP.[128] The Commission is closely coordinating its efforts in the instant docket with the *CALEA Rulemaking*.[129] Thus, these Comments will herein address CALEA as it relates to IP Telephony.

Although IP Telephony would not be subject to CALEA as an interstate information service,[130] the Commission nevertheless should require IP Telephony providers to meet the principles set forth in CALEA. As a matter of fairness to IP Telephony providers that have invested the resources necessary for their systems to meet the CALEA requirements, the Commission should require all entities offering IP Telephony to make the same investment. The Commission can accomplish this, and also enhance public safety, by requiring IP Telephony providers to comply with CALEA's principles based upon an IP-specific standard endorsed by an industry body, with appropriate modifications to allow for CALEA compliance given the specifics of IP Telephony technology.

The Commission should exercise its Title I ancillary jurisdiction[131] to regulate IP Telephony, an interstate information service, so that this service complies with CALEA. Doing so would advance the Commission's basic purpose "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio

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[128] *See Comment Sought on CALEA Petition for Rulemaking*, RM-10865, Public Notice, DA 04-700 (rel. March 12, 2004) ("*CALEA Rulemaking*").

[129] *See* NPRM at n.158.

[130] The Commission has ruled that facilities used solely for the provision of information services are not subject to CALEA, but that facilities providing both telecommunications and information services are subject to CALEA. *See Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105 at ¶¶ 12, 27 (1999).

[131] *See* 47 U.S.C. § 154(i).

communication service with adequate facilities . . ."[132] that, in this case, meets the nation's public safety needs. Furthermore, the goals stated in Section 230(b) of the Act support the Commission's use of Title I ancillary jurisdiction to impose CALEA compliance upon IP Telephony, as that would, *inter alia*, "ensure vigorous enforcement of Federal criminal laws . . . ."[133]

Ample precedent exists for the Commission to assert its ancillary jurisdiction over an information service such as IP Telephony where necessary to achieve overriding public policy goals. For example, the Commission asserted its Title I ancillary jurisdiction to extend statutory accessibility requirements to providers, and manufacturers of equipment that provide two specific information services: voicemail and interactive menu services.[134] Before that, the Commission asserted its ancillary jurisdiction over information services in its *Computer II* orders.[135]

The Commission's enforcement of CALEA obligations upon IP Telephony providers should be accomplished in phases to allow for development of equipment so that meeting CALEA's obligations are feasible. The Commission has allowed such "phase-ins" for services far more technically mature than IP Telephony. For example, the Commission provided for two phases to allow terrestrial wireless carriers to implement enhanced 911 (the first phase consisting of Automatic Number Information and second phase consisting of Automatic Location

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[132] 47 U.S.C. § 151.

[133] 47 U.S.C. § 230(b)(5).

[134] *See Reminder to Manufacturers and Providers of Voice Mail and Interactive Menu Products and Services of Their Accessibility Obligations under New Part 7 of the Commission's Rules*, 15 FCC Rcd 19088 at ¶ 2 (2000) (citing *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 at ¶¶ 93-108 (1999) ("*Section 255 Report and Order*")).

[135] *See Section 255 Report and Order* at n.216.

Identification).[136] Moreover, the Commission's *Computer III* included technical feasibility as a factor in determining the unbundling standards for Bell Operating Companies' open network architecture plans.[137]

If the Commission determines that, despite its jurisdictional ability to impose CALEA requirements upon IP Telephony, CALEA is simply inapplicable to this new service, the Commission should review other existing criminal statutes' applicability to IP Telephony. For instance, the Electronics Communications Privacy Act of 1986 ("ECPA")[138] provides a statutory mechanism under which law enforcement agencies can obtain court orders mandating companies that provide "electronic communication service" to disclose certain subscriber records in those cases where the law enforcement agency sets forth "specific and articulable facts showing that there are reasonable grounds to believe that [the requested information is] relevant and material to an ongoing criminal investigation."[139] The Commission should examine the ECPA for its applicability to IP Telephony if it determines that CALEA cannot be imposed upon IP Telephony providers without legislative changes.

7. Applicability of Equal Access and Anti-Slamming Rules

Paragraphs 72 and 73 of the NPRM seek comment on, among other things, whether slamming and interexchange carrier ("IXC") equal access requirements should apply to VoIP providers. Such provisions should not apply in the context of IP Telephony. The concepts of equal access and dialing parity are intended to ensure nondiscrimination in the choice of IXC,

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[136] *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576 at ¶ 28 (2002).

[137] *See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 at ¶¶ 80, 83 (1998) (citing *Computer III* at ¶¶ 213-18).

[138] Pub. L. No. 99-508, 100 Stat. 1848, as amended by the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[139] *See In Re Application of the United States of America for an Order Pursuant to 18 U.S.C. §2703(d)*, 157 F. Supp. 2d 286 (S.D.N.Y. 2001) (citing 18 U.S.C. § 2703(d)).

while slamming prohibits a carrier from assigning an IXC without the end-user customer's consent. In a circuit-switched telecommunications environment, a LEC provides local service to an end-user, who may choose a separate carrier to provide toll service. As is often the case (and certainly was the typical situation prior to the grant of various ILEC Section 271 applications), the LEC does not have a long distance affiliate that provides the toll service. In the circuit-switched environment, because a choice of a toll carrier is necessary to complete long distance calls, rules exist to ensure that one IXC is not favored over another when the end-user chooses a toll carrier (dialing parity and equal access), and to prohibit a choice of IXC from being made without the customer's consent (slamming).

In the IP Telephony context, however, it is unlikely that there will be separate charges for long distance calls. Rather, the IP Telephony offerings are likely to provide local and long distance at a fixed rate. It is conceivable that some IP Telephony providers may decide to allow customers to choose an IXC if they so desire, in which case slamming rules may be appropriate. However, it is anticipated that IP Telephony providers will typically offer rate plans featuring a single flat rate charge for monthly service that includes both local and long distance calling.

It is difficult to imagine why a customer enjoying postalized rates for local and long distance would choose to have a separate IXC provide interexchange service when the customer already is receiving such service at no extra cost. Under such circumstances, there is no economic incentive for a customer to choose a separate long distance provider, as long distance would already be included in the flat rate plan. The Commission's anti-slamming rules would make no sense in an environment where there is no economic incentive to choose a separate IXC. Accordingly, competitive safeguards designed to protect the *choice* of IXCs, such as dialing parity and anti-slamming rules, have no applicability in this context, and should not be imposed on IP Telephony providers. Indeed, the Commission has already put in place such an

exception to the slamming rules in the similar situation where CMRS carriers do not offer a choice of presubscribed long distance carriers.[140]

Cable Ops believes that the wireless model, where the Commission created an exception to the slamming rules for CMRS carriers, provides a more suitable approach for regulation of IXC selection in the IP Telephony context. As the Commission stated in its *Slamming Second Report and Order*:

> We conclude that CMRS providers should not be subject to our verification rules at this time because slamming does not occur in the present CMRS market. CMRS providers are not currently subject to equal access requirements. In other words, a CMRS provider is free to designate any toll carrier for its subscribers unless it has voluntarily chosen not to do so. We believe that many CMRS providers offer their subscribers telecommunications service packages that include local exchange, intraLATA toll, and interLATA toll services using particular carriers, and therefore any consumer who has agreed to subscribe to such a package as offered by a CMRS provider may have agreed to use only those carriers. Where a CMRS provider does not offer its subscribers any choices in toll carriers, verification of subscriber authorization to change toll providers would be inapplicable.[141]

Just as in the CMRS context, the IP Telephony customers would likely agree to a flat-rate plan that includes local and long distance service, and under such circumstances selection of an alternative IXC would make no economic sense from the customer's point of view. Cable Ops submit that, just as in the CMRS context, IP Telephony providers should not be subject to the Commission's anti-slamming and equal access regulations where they do not offer a choice of IXC and where IP Telephony and CMRS providers alike are not properly classified as LECs. [142] Rather, as the Commission has recognized with respect to CMRS, Section 201(b) of the Act,

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[140] *Implementation of the Subscriber Carrier Selection Changes Provisions of The Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and Further Notice, 14 FCC Rcd 1508, ¶ 85 (1998) ("*Slamming Second Report and Order*").

[141] *Id.*

[142] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 79 (1997) (citation omitted).

which prohibits unreasonable practices, would continue to apply and would be sufficient to curb any unauthorized carrier changes.[143]

8. Title VI Considerations

In the NPRM, the Commission asks about the applicability of Title VI to cable-based IP-enabled services.[144] As described in Section IV.A. above, Cable Ops have shown that IP Telephony is an interstate "information service" to which Title I would apply. Moreover, this categorization does not change to "cable service" to which Title VI would apply simply because a cable operator provides the IP Telephony over facilities that are also used to provide cable service.[145] Indeed, the Commission has previously ruled that cable modem service provided over a cable system is an interstate information service, not a cable service.[146] Many of the same reasons given by the Commission apply equally to IP Telephony:

- "[C]able operators do not control the majority of information accessible by [IP Telephony] subscribers,"[147] since the vast majority of such information will be voice or other information originated by the subscribers themselves.

- "[V]ideo programming historically transmitted by cable operators to subscribers . . . is not provided today through [IP Telephony] service."[148]

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[143] *See id.* at n.279.

[144] NPRM at ¶ 70.

[145] *See High-Speed Access Declaratory Ruling* at ¶ 35 ("None of the foregoing statutory definitions rests on the particular types of facilities used. Rather, each rests on the function that is made available") (citing *Stevens Report* at ¶ 59). The Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6).

[146] *High-Speed Access Declaratory Ruling* at ¶ 33. Cable Ops are obviously aware of the U.S. Court of Appeals for the Ninth Circuit's decision in *Brand X* that cable modem service contains both information service and telecommunications service components. However, this decision was an anomaly. Among other flaws, the decision merely follows the court's earlier decision in *AT&T v. City of Portland*, 216 F.3d 871, without taking into account that the *City of Portland* case was decided before the FCC's *High-Speed Access Declaratory Ruling*, which expressly decided that cable modem service is an interstate information service containing "no separate offering of telecommunications service." *High-Speed Access Declaratory Ruling* at ¶ 33.

[147] *Id.* at ¶ 62.

[148] *Id.* at ¶ 63 (footnote omitted). The Commission went on to explain that "*[e]ven if streaming video does achieve television quality, it would not be treated as a cable service unless it otherwise falls within the definition of 'cable service.'*" *Id.* at n.236 (emphasis in original).

- "'Other programming service' does not include information that is subscriber specific."[149]

- "As the Commission has held, services offering a high degree of interactivity . . . would fall outside the scope of video programming under the definition of 'cable service' enacted in 1984."[150]

Perhaps most importantly, by deciding that IP Telephony provided by a cable operator over a cable system is also an information service, the Commission will allow this service to flourish, furthering its and Congress' stated goals of "encourag[ing] the ubiquitous availability of broadband to all Americans,"[151] and encouraging the deployment of advanced telecommunications capability to all Americans by "regulatory forbearance, measures that promote competition . . . , or other regulating methods that remove barriers to infrastructure investment."[152]

Similarly, "standard" cable pole attachment rates pursuant to 47 U.S.C. § 224(d) should not be affected by the provision of IP Telephony over a cable system. The U.S. Supreme Court has already agreed with the Commission that this is the case as to Internet services provided by a cable system, even where such services are commingled with cable services.[153] Otherwise, as was the case with respect to Internet service,

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[149] *Id.* (footnote omitted).

[150] *Id.* at 64 (footnote omitted).

[151] *High-Speed Access Declaratory Ruling* at ¶ 4 (quoting *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 3 (2002)).

[152] *Id.* at ¶ 4 (quoting 47 U.S.C. § 157 note). The Commission also asks whether any class of IP-enabled services is properly classified under the Act as "cable service." NPRM at ¶ 70. Cable Ops believe that this issue, which focuses on video programming, is beyond the practical scope of this proceeding at this stage. *See* 47 U.S.C. § 522(6). As will be evident from the vast majority of comments in response to the NPRM, the focus of this proceeding is telephony. It would be imprudent to draw conclusions about IP-enabled video programming absent a more focused record and careful monitoring of technical developments in this area. *Cf. Internet Ventures Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3247 (2000).

[153] *National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327 (2002).